

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Expanding the Economic and Innovation	)	GN Docket No. 12-268
Opportunities of Spectrum Through Incentive	)	
Auctions	)	

**PETITION FOR RECONSIDERATION**

THE VIDEOHOUSE, INC.  
Ronald J. Bruno, President  
975 Greentree Road  
Pittsburgh, PA 15220

ABACUS TELEVISION  
Benjamin Perez, Owner  
514 Chautauqua Street  
Pittsburgh, PA 15214

WMTM, LLC  
Lawrence Rogow, Member  
5670 Wilshire Blvd, Ste. 1300  
Los Angeles, CA 90036

KMYA, LLC  
Larry E. Morton, Co-President  
#1 Shackleford Drive  
Little Rock, AR 72211

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Channel Sharing by Full Power and Class A	)	MB Docket No. 15-137
Stations Outside the Broadcast Television	)	
Spectrum Incentive Auction Context	)	

**PETITION FOR RECONSIDERATION**

**I. INTRODUCTION AND SUMMARY**

Pursuant to Section 1.429 of the Commission’s rules,<sup>1</sup> The Videohouse, Inc. (“Videohouse”), Abacus Television (“Abacus”), WMTM, LLC (“WMTM”), and KMYA, LLC (“KMYA”) (collectively, “Petitioners”) hereby submit this Petition for Reconsideration of the Second Report and Order on Reconsideration in the above-captioned proceeding.<sup>2</sup> The Petitioners are the licensees of Class A-eligible television stations WOSC-CD, WPTG-CD, WIAV-CD, and KKYK-CD, respectively, each of which is a legacy out-of-core Class-A eligible

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<sup>1</sup> 47 C.F.R. § 1.429.

<sup>2</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions; Channel Sharing by Full Power and Class A Stations Outside the Broadcast Television Spectrum Incentive Auction Context*, Second Order On Reconsideration, 30 FCC Rcd 6746 (2015) (“*Second Reconsideration Order*”). Except for KMYA, each of the Petitioners participated earlier in this proceeding. KMYA is a party “aggrieved or whose interests are adversely affected thereby” entitled to seek reconsideration, and is participating at this stage in order to protect its right to seek judicial review of the decision issued in response to this petition. See 47 U.S.C. § 405(a) (“The filing of a petition for reconsideration shall not be a condition precedent to judicial review of such order . . . except where the party seeking such review . . . was not a party to the proceedings resulting in such order . . .”).

television station that obtained an in-core channel but, due to circumstances beyond its licensees' control, was not able to file for a digital Class A license until after February 22, 2012. Each of these stations has, however, complied with the subsequent requirements that it timely file a Form 2100, Schedule 381 (and a Petition for Eligible Entity Status because they were not included on the list of eligible stations), and all were licensed Class A stations by the pre-auction licensing deadline of May 29 2015. Based on petitioners' knowledge and investigation, they are the only four stations that today fall within this category.

As Petitioners explained earlier in this proceeding, the refusal of the Federal Communications Commission ("FCC" or "Commission") to protect these stations in the broadcast television incentive auction contravenes the Spectrum Act's directive regarding service protection and the mandate of the Community Broadcasters Protection Act of 1999 (the "CBPA"), arbitrarily subjects Petitioners' stations to disparate treatment as compared to other stations to which the FCC has extended discretionary protection, and strands significant private investment and years of good faith efforts by Petitioners to secure digital Class A licenses for their facilities.<sup>3</sup> In the *Second Reconsideration Order*, the Commission rejected these

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<sup>3</sup> See Petition for Reconsideration of The Videohouse, Inc., GN Docket No. 12-268 (Sept. 15, 2014); Petition for Reconsideration of Abacus Television, GN Docket No. 12-268 (Sept. 15, 2014); Opposition of Asiavision, Inc., GN Docket No. 12-268 (Nov. 9, 2014); Supplement to Petition for Reconsideration of Abacus Television, GN Docket No. 12-268 (Nov. 14, 2014). WMTM consummated its acquisition of the license of WIAV-CD from Asiavision, Inc. ("Asiavision") on April 17, 2015, see FCC File No. BALDTL-20140515AGQ, and is thus the successor-in-interest to Asiavision for purposes of this proceeding.

arguments<sup>4</sup> and, instead, decided to extend discretionary protection to a wholly different group of stations whose licensees did not file petitions for reconsideration.<sup>5</sup>

To be clear, Petitioners do not take issue with the Commission's substantive decision to afford these other stations protection. The Commission is correct that its discretionary protection should cover a larger group of Class A eligible stations than the single station (KHTV-CD) that it said it would protect in the *Incentive Auction R&O*.<sup>6</sup> However, the Commission cannot deny and dismiss Petitioners' filings, then "clarify" its earlier ruling. Rather, the Commission must grant on reconsideration Petitioners' petitions for reconsideration and extend protection to those Class A eligible stations that filed for a license to cover by the Pre-Auction Licensing deadline of May 29, 2015. As demonstrated below, this would extend discretionary protection to *only four stations* in addition to those the Commission decided to protect in the *Second Reconsideration Order*. The FCC's determination not to extend the same degree of protection to Petitioners' stations was based on factually inaccurate conclusions and suffers from numerous procedural flaws, and thus must be reconsidered.

## **II. THE FCC'S TREATMENT OF OUT-OF-CORE CLASS A-ELIGIBLE STATIONS IN THE *SECOND RECONSIDERATION ORDER* WAS BASED ON INACCURATE FACTUAL PREMISES.**

### **A. The *Second Reconsideration Order* Misstates Numerous Facts Regarding Petitioners' Stations.**

The Commission erroneously contends that petitioners' arguments must be dismissed on procedural grounds because "petitioners did not attempt to demonstrate in response to the

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<sup>4</sup> *Second Reconsideration Order*, ¶¶ 53-61.

<sup>5</sup> *Id.* ¶ 62 ("Based on an examination of the record, we will exercise discretion to protect stations in addition to KHTV-CD that hold a Class A license today and that had an application for a Class A construction permit pending or granted as of February 22, 2012.").

<sup>6</sup> *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Report and Order*, 29 FCC Rcd 6567, ¶ 235 (2014) ("*Incentive Auction R&O*").

Incentive Auction NPRM why they should be afforded discretionary protection.”<sup>7</sup> First, the appropriate inquiry is whether *facts or arguments* were previously presented to the Commission, *not* whether a *particular individual* has presented those facts or arguments. Section 1.429(b) makes this plain, in imposing a higher barrier *only* where an argument “ha[s] not previously been presented.” This rule embodies concepts similar to those contained in Section 405(a) of the Communications Act, which provides that an issue can be raised on appeal only if the FCC “has been afforded [an] opportunity to pass” upon it. Interpreting this requirement, the courts have concluded that the “opportunity” does not have to be “afforded in any particular manner, *or by any particular party*,” as long as an issue is “raised meaningfully by someone.”<sup>8</sup> In applying this standard, the courts “ask whether a reasonable Commission necessarily would have seen the question raised before [the court] as part of the case presented to it.”<sup>9</sup> Here, the record is replete with comments filed in response to the Incentive Auction NPRM that argued the Commission must protect Class A stations not licensed as of February 22, 2012.<sup>10</sup> In addition, entities with

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<sup>7</sup> *Second Reconsideration Order*, ¶59.

<sup>8</sup> *Coalition for Noncommercial Media v. FCC*, 249 F.3d 1005, 1008 (D.C. Cir. 2001) (emphasis added, quoting *Office of Communication of the United Church of Christ v. FCC*, 465 F.2d 519, 523 (D.C. Cir. 1972)); *see also Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 739 (D.C. Cir. 1976).

<sup>9</sup> *Time Warner Entertainment Co. v. FCC*, 144 F.3d 75, 81 (D.C. Cir. 1998).

<sup>10</sup> *See* Reply Comments of Venture Technologies Group, LLC at 2 (arguing that the Commission must protect the very limited number of Class A stations – including KHTV-CD- that remained Class A eligible since 2000 and received a Class A license after February 22, 2012); Comments of Action Community Television Broadcasting Network, Inc. at 2 (strongly opposing the Commission’s proposal to prohibit Class A stations whose applications were pending as of February 22, 2012 from participating in the auction); Comments of United Communications Corporation at 5 (disagreeing with the Commission’s proposal to not protect Class A eligible stations arguing this is fundamentally unfair); Comments of Vision Communications at 5-6 (eligibility and protection should be extended to all Class A stations and permittees as of February 22, 2012); Comments of National Religious Broadcasters at 7 (A low power station that can demonstrate compliance with Class A requirements should be protected). Additionally, numerous commenters argued that the Class A facilities in operation as of the date of the

ownership interests in the licenses of WOSC and WIAV themselves submitted comments in the earlier proceeding arguing for the protection of Class A facilities in operation as of the date of the auction.<sup>11</sup> Additionally, they submitted an *ex parte* arguing that the FCC should grant discretionary protection to all Class A-eligible stations whose facilities are built and licensed by the pre-auction licensing deadline of May 29, 2015—a class of stations which includes only the four stations that are the subject of this petition.<sup>12</sup>

Alternatively, the Commission asserts that it correctly rejected petitioners' claims because they are not similarly situated to KHTV-CD. In support, the Commission details KHTV's efforts to secure its Class A license over many years. However, this determination is completely arbitrary, and deference to "the Commission's line-drawing decisions extends only so far as the line-drawing is consistent with the evidence or is not patently unreasonable."<sup>13</sup> The agency makes no effort to explain why it was reasonable to protect KHTV and the additional stations granted protection in the *Second Reconsideration Order*, but not petitioners' four stations.

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incentive auction should be protected: Comments of Casa En Denver, Inc. at 3 (arguing that the Commission should protect certain Class A facilities not licensed as of February 22, 2012); Comments of Entravision Holdings, LLC at 2 (the FCC should value a Class A station based on the licensed facilities as of the commencement of the auction, not February 22, 2012); Comments of KAZN License, LLC at 8 (arguing that the definition of "licensee" in the Spectrum Act would extend to holders of construction permits); Comments of Polnet at 2 (the Commission should consider Class A facilities in existence as of the date of the incentive auction); Comments of Local Media Holdings, LLC at 2 (the Class A facility licensed as of the date of the incentive auction is the facility that should be protected); Reply Comments of Bruno Goodworth Network, Inc. at 2 (arguing that Commission should evaluate Class A facilities for reverse auction purposes as of the date of the commencement of the reverse auction rather than February 22, 2012).

<sup>11</sup> *Second Reconsideration Order*, ¶59.

<sup>12</sup> Notice of *Ex Parte* Communication re: May 27, 2015 meeting.

<sup>13</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 420 (3d Cir. 2004) (citing *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002)).

The efforts of these stations, which were made over periods of many years, were amply detailed in their previous filings and are equally deserving of consideration.<sup>14</sup> In extending discretionary protection to a group of Class A stations—which did not include Petitioners’ four stations—the Commission found persuasive the fact that stations had “documented efforts *prior to the passage of the Spectrum Act* to remove their secondary status and avail themselves of Class A status.”<sup>15</sup> Specifically, each station in the protected group “certified in an application filed with the Commission that they were operating like Class A stations.”<sup>16</sup> However, Petitioners’ four stations also made certifications that they were operating in compliance with all Class A requirements and placed that certification in their respective public files each quarter. Additionally, each station provided the required amount of children’s and locally produced programming and filed children’s programming reports as required.<sup>17</sup> The Commission fails to distinguish between the compliance efforts of the group of Class A eligible stations it protected and these four stations, because it cannot. The Commission must therefore extend its discretionary protection to each station in this limited group.

Ultimately, the Commission’s apparent determination that these stations did not try “as hard as” KHTV to secure a Class A license is irrational and does not articulate “a rational

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<sup>14</sup> See Petition for Reconsideration of The Videohouse, Inc., GN Docket No. 12-268 (Sept. 15, 2014); Petition for Reconsideration of Abacus Television, GN Docket No. 12-268 (Sept. 15, 2014); Opposition of Asiavision, Inc., GN Docket No. 12-268 (Nov. 9, 2014); Supplement to Petition for Reconsideration of Abacus Television, GN Docket No. 12-268 (Nov. 14, 2014); *see also* attached as Exhibit 1, Petition for Eligible Entity Status filed by The Videohouse, Inc. (July 9, 2015); Petition for Eligible Entity Status filed by Abacus Television (July 9, 2015); Petition for Eligible Entity Status filed by WMTM, LLC (July 9, 2015); Petition for Eligible Entity Status filed by KMYA, LLC (July 9, 2015).

<sup>15</sup> *Second Reconsideration Order*, ¶ 62 (*emphasis added*).

<sup>16</sup> *Id.*

<sup>17</sup> See Petition for Reconsideration of The Videohouse, Inc., GN Docket No. 12-268 (Sept. 15, 2014); Petition for Reconsideration of Abacus Television, GN Docket No. 12-268 (Sept. 15, 2014); Opposition of Asiavision, Inc., GN Docket No. 12-268 (Nov. 9, 2014); *See also* Exhibit 1.



connection between the facts found and the choice made.”<sup>18</sup> It also results in impermissible arbitrary discrimination among similarly situated parties.<sup>19</sup> The facts remain that there was no deadline to apply for a Class A license and that each of these stations worked diligently to build its digital facility.<sup>20</sup> The hardships and obstacles each faced were unique. The FCC failed to—and cannot—articulate a rational explanation of the subjective standard that it utilized to reach its decision. Its decision therefore “offer[s] an explanation for its decision that runs counter to the evidence” and is arbitrary and capricious.<sup>21</sup>

**B. The FCC’s Finding That Protection of Petitioners’ Stations Would Require Protection of 100+ Stations Is Inaccurate.**

In both its underlying and recent decision, the FCC places great emphasis on its belief that over 100 additional stations would receive protection and thus encumber additional spectrum if it extended discretionary protection to Class A eligible stations that had not applied for a license to cover by February 22, 2012.<sup>22</sup> However, despite repeated requests, the Commission has never backed up this statement with a list of stations in this category. In fact, in response to a

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<sup>18</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

<sup>19</sup> *E.g.*, *Independent Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996) (“An agency cannot meet the arbitrary and capricious test by treating type A cases differently from similarly situated type B cases . . . . The treatment . . . must be consistent.”); *McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (noting “the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment”); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965) (stating that “the Commission’s refusal at least to explain its different treatment . . . was error”).

<sup>20</sup> *Report and Order*, Establishment of a Class A Television Service, MM Docket No. 00-10 (Apr. 4, 2000) (“Class A Report and Order”) at ¶49.

<sup>21</sup> *State Farm*, 463 U.S. at 43 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

<sup>22</sup> *E.g.*, Spectrum Auction R &O at ¶ 232; *Second Order on Reconsideration* at ¶ 54 & nn.177, 222, 224.

request made by at least one member of Congress, the Commission indicated that it does not have such a list.

In the Second R&O, the Commission asserts that “stations falling in this category can be identified using ...CDBS.” Specifically, the Commission suggests that an interested party can compare the stations included on the Class A PN,<sup>23</sup> against CDBS records to determine which stations have filed a license to cover a Class A facility. This is a fool’s errand because any station that transitioned to digital facilities using digital companion channels (“DCC”) was assigned a new facility ID and call sign. Further, at some point during the last year, the Commission—unannounced—took the step of deleting the underlying analog facility call sign and facility ID associated with DCC facilities, even when the analog facility was still in operation, leaving only the DCC facility ID and call sign in CDBS. Thus, the original Class A PN cannot possibly be reconciled with the records currently in CDBS. The Commission is likely well-aware of this fact, given its reluctance to supply such a list in response to repeated requests.

The exercise of trying to determine how many stations at one time qualified for Class A status but never obtained a license is ultimately pointless. Regardless of how many unlicensed Class A eligible stations existed when the Incentive Auction R&O was released, there remain only four stations—WOSC-CD, WPTG-CD, WIAV-CD, and KKYK-CD—that were Class A eligible and have satisfied the subsequent deadlines to receive protection during the Spectrum Incentive Auction process. The Commission, as required in the Incentive Auction Order, established a Pre-Auction Licensing deadline of May 29, 2015,<sup>24</sup> subsequently issued a list of

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<sup>23</sup> *Certificates of Eligibility for Class A Television Station Status*, Public Notice, 15 FCC Rcd 9490 (MB 2000) (“Class A PN”).

<sup>24</sup> *Media Bureau Designates May 29, 2015 as Pre-Auction Licensing Deadline*, Public Notice, DA 15-116 (January 28, 2015) (affirming that only stations licensed by this date will be eligible for protection in the repacking process that will be part of the television incentive auction).

spectrum auction eligible stations, and required these stations to file a Form 2100, Schedule 381 (or file a Petition for Eligible Entity Status if they were not included on the list of eligible stations).<sup>25</sup> Petitioners' stations all were licensed as Class A stations by May 29, 2015 and all filed a Petition for Eligible Entity Status and the corresponding Schedule 2100, Form 381.<sup>26</sup> Other than the Class A stations already granted protection and these four stations, there are no additional Class A eligible stations that met these deadlines.

Petitioners confirmed that only **four** stations remain in play by analyzing the FCC's databases and other documents as described below. Petitioners downloaded a snapshot of the CDBS database on May 29, 2015, pulling a list of all Class A licenses on file as of that date. They compared this list against the list of auction eligible Class A facilities included as an attachment to the Media Bureau's June 9, 2015 Public Notice announcing the stations eligible for participation in the incentive auction.<sup>27</sup> There were twelve Class A stations that were included in the CDBS list of stations with a Class A license as of May 29, 2015 that were not included on the June 9, 2015 list of auction eligible stations. Six of these stations have had their licenses cancelled or downgraded to LPTV status. Two stations were mistakenly left off the list of auction eligible stations and will be protected according to letters issued by the Media Bureau. This leaves only four stations that held a Class A licensee as of May 29, 2015, but were excluded

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<sup>25</sup> *Media Bureau Announces Incentive Auction Eligible Facilities and July 9, 2015 Deadline for Filing Pre-Auction Technical Certification Form*, Public Notice, DA 15-679 (June 9, 2015) (explaining deadlines and procedures for filing a Petition for Eligible Entity Status).

<sup>26</sup> See attached as Exhibit 1, Petition for Eligible Entity Status filed by The Videohouse, Inc. (July 9, 2015); Petition for Eligible Entity Status filed by Abacus Television (July 9, 2015); Petition for Eligible Entity Status filed by WMTM, LLC (July 9, 2015); Petition for Eligible Entity Status filed by KMYA, LLC (July 9, 2015).

<sup>27</sup> *Media Bureau Announces Incentive Auction Eligible Facilities and July 9, 2015 Deadline for Filing Pre-Auction Technical Certification Form*, Public Notice, DA 15-679 (June 9, 2015).

from the July 9, 2015 list of auction-eligible stations and thus will be left unprotected—WOSC-CD, WPTG-CD, WIAV-CD, and KKYK-CD.

Whether or not 100+ Class A eligible stations would have been a factor in 2012, only four such stations remain in play today, and the FCC’s continued emphasis on the 100-station figure makes no sense. The Commission, in “clarifying” that its discretionary protection extends to “approximately a dozen stations” that had an application for conversion on file as of February 22, 2012, found that “protecting additional stations will impact our flexibility in the repacking process”<sup>28</sup>, however “there are significant equities in favor of protecting these stations that outweigh the limited adverse impact on our repacking flexibility”<sup>29</sup>. These same equities demand protection of the four remaining stations. The Commission erred by failing to extend discretionary protection to these four stations in the *Second Reconsideration Order*, and it must now correct this error.

### **III. THE FCC’S TREATMENT OF OUT-OF-CORE CLASS A-ELIGIBLE STATIONS IN THE *SECOND RECONSIDERATION ORDER* WAS PROCEDURALLY IMPROPER.**

#### **A. The FCC Exceeded Its Authority To Resolve The Pending Petitions For Reconsideration.**

In the *Second Reconsideration Order*, the FCC purported to “address[] petitions for reconsideration” of its *Incentive Auction R&O* related to out-of-core Class A-eligible stations.<sup>30</sup> Under the Communications Act and the FCC’s rules, the Commission’s authority to resolve petitions for reconsideration is limited. Section 405(a) of the Communications Act provides that, in taking such action, the FCC “shall enter an order, with a concise statement of the reasons

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<sup>28</sup> See *Second Reconsideration Order*, nn. 226 & 224

<sup>29</sup> *Id.* ¶ 62.

<sup>30</sup> *Second Reconsideration Order*, ¶¶ 1, 52-61.

therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate.”<sup>31</sup> The Commission has implemented this statutory requirement in Section 1.429(i) of its rules, which provides that “[t]he Commission may grant the petition for reconsideration in whole or in part or may deny or dismiss the petition.”<sup>32</sup> In the *Second Reconsideration Order*, however, the Commission went well beyond the authority afforded by the Communications Act and its rules.

Although it “den[ied]” the petitions for reconsideration of Videohouse and Abacus, the FCC decided that it should significantly change the course charted in the *Incentive Auction R&O* and extend discretionary protection to additional stations licensed to parties that did not seek reconsideration.<sup>33</sup> Specifically, the Commission decided that it would protect stations that “hold a Class A license today and that had an application for a Class A *construction permit* pending or granted as of February 22, 2012.”<sup>34</sup> The FCC explained that it was using the term “Class A construction permit” to refer to “an application to convert an LPTV construction permit to a Class A construction permit,”<sup>35</sup> in essence, a Class A conversion application. As part of this discussion, the FCC acknowledged that it was departing from the *Incentive Auction R&O*, which expressly stated that, “with one exception,” it would not protect any stations that were eligible for a Class A license “but that did not file an application for such *license* until after February 22,

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<sup>31</sup> 47 U.S.C. § 405(a).

<sup>32</sup> 47 U.S.C. § 1.429(i).

<sup>33</sup> *Second Reconsideration Order*, ¶¶ 53, 62.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* ¶ 53.

2012.”<sup>36</sup> In shifting its focus from the filing of a *license* to the filing of a *Class A conversion application* as of the operative date, the Commission substantively altered the conclusions reached in the *Incentive Auction R&O* to protect “approximately a dozen” additional stations,<sup>37</sup> even though no party had filed a petition for reconsideration requesting this relief. This action went well beyond any reasonable interpretation of “granting” or “denying” the petitions for reconsideration related to out-of-core Class A-eligible LPTV stations, and therefore exceeded the FCC’s authority governing reconsideration under the Communications Act and its own rules.

The fact that parties had filed narrow petitions for reconsideration requesting relief different from what the Commission afforded does not change this result.<sup>38</sup> Indeed, if the pendency of *any* reconsideration petition—however narrow—permits the FCC to alter any aspect of its order, parties to proceedings in which reconsideration petitions are filed would remain in regulatory limbo until the FCC decided to address every petition filed in a given proceeding.

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<sup>36</sup> The FCC suggests that its intentions with respect to out-of-core Class A-eligible stations might have been ambiguous. *See id.*, ¶ 53 n.187 (stating that it would protect these stations even though “[c]ertain language in the *Incentive Auction R&O* could be read to suggest otherwise”). This is an inaccurate characterization of the *Incentive Auction R&O*, which clearly stated that “[w]ith one exception, we will not protect stations that are eligible for a Class A license but that did not file an application for such license until after February 22, 2012, even if the application is granted before the auction,” and discussed the subject station—KHTV-CD—by name. *Incentive Auction R&O*, ¶ 233 (emphasis added).

<sup>37</sup> *Second Reconsideration Order*, ¶ 62 n.226.

<sup>38</sup> *Globalstar, Inc. v. FCC*, 564 F.3d 476 (2009), is not to the contrary. In that case, the petitioner sought reconsideration of an FCC order and sought both specific relief and, in the alternative, broadly asked the Commission to “reverse its ill-advised decision.” *Id.* at 486. Here, on the other hand, Videhouse, Abacus, and Asiavision narrowly requested that the FCC reconsider the *Incentive Auction R&O* as it pertained specifically to WOSC-LD, WPTG-CD, and WIAV-CD. Videohouse Petition at 1; Abacus Petition at 1; Asiavision Opposition at 1. In no sense did these parties suggest, as the D.C. Circuit found *Globalstar* did, that the FCC should reconsider its entire decision. Nor does the D.C. Circuit’s decision in *AT&T Corp. v. FCC*, 113 F.3d 225 (1997), support the Commission’s action. The court there held that there was “nothing in the record to suggest that the FCC changed its position,” *id.* at 229, but the same cannot be said here.

This result would undermine any interest in finality of administrative proceedings, an indisputably important interest that the Commission “has long encouraged.”<sup>39</sup>

Allowing the FCC such broad discretion to alter underlying orders when acting on petitions for reconsideration would also conflict with the manner in which the courts deal with judicial appeals of FCC orders that are subject to reconsideration. When one party petitions for reconsideration of an FCC order and another party appeals,<sup>40</sup> the courts will sometimes—but *not always*—hold the appeal in abeyance pending the resolution of the agency reconsideration petition.<sup>41</sup> As particularly relevant here, in evaluating whether or not to hold an appeal in abeyance, the courts look to the *contents* of the pending petitions for reconsideration and whether those petitions raise issues that involve the “central problem[s]” at issue in court appeals.<sup>42</sup> If there is overlap between the matters raised before the agency on reconsideration and those raised

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<sup>39</sup> *E.g., W. Pac. Broad., LLC Amendment of Section 73.622(i) Digital Television Table of Allotments (Seaford, Delaware & Dover, Delaware)*, 29 FCC Rcd 4773 (2014).

<sup>40</sup> A party’s own filing of a petition for reconsideration at an administrative agency renders the underlying order non-final, and thus non-reviewable, as to that party alone. *See, e.g., Bellsouth Corporation v. FCC*, 17 F.3d 1487, 1489-90 (D.C.Cir.1994). However, a party other than the one that filed for reconsideration is permitted to appeal the underlying decision, even though other parties’ reconsideration petitions remain pending. *See, e.g., Teledesic LLC v. FCC*, 275 F.3d 75, 82 (D.C. Cir. 2001) (“The fact that parties other than Teledesic petitioned the FCC for reconsideration of the Report and Order does not deprive the court of jurisdiction over Teledesic’s petition.”); *ICG Concerned Workers Ass’n v. United States*, 888 F.2d 1455, 1458 (D.C. Cir. 1989) (quoting *West Penn Power Co. v. EPA*, 860 F.2d 581, 587 (3d Cir. 1988)) (“[i]f any party could render an action nonfinal for all [parties] simply by filing a petition for reconsideration,” it would “thwart[]” Congress’s intent “to allow parties who so desire to get speedy judicial relief”).

<sup>41</sup> *Teledesic*, 275 F.3d at 82 (stating that the practice of holding appeals in abeyance in these circumstances “is not an iron-clad rule”) (citing *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998)); *American Library Ass’n v. FCC*, No. 04-1037, 2004 WL 1179355 (D.C. Cir. May 27, 2004) (declining to hold case in abeyance despite pending reconsideration petitions).

<sup>42</sup> *MCI*, 143 F.3d at 608.



in court appeals then abeyance may be granted but, if not, then courts will often find that “prudential considerations militate in favor of a prompt judicial decision.”<sup>43</sup>

A regime under which the FCC has unbounded discretion to modify an underlying order in any way that it wishes regardless of the contents of pending petitions for reconsideration—as it has done here—would render the analysis undertaken by the courts in the context of abeyance decisions entirely irrelevant. If the mere filing of a petition for reconsideration leaves the FCC free to modify any aspect of its underlying order at its whim, then there would be no reason for the courts to spend time analyzing the degree of overlap between petitions for reconsideration and judicial appeals in deciding how to handle their busy dockets. There would also be no reason for courts ever to decline to hold a case in abeyance when a reconsideration petition was pending, because the mere pendency of such a petition would permit the Commission free to address the issues raised in the appeal in a manner that made the court’s involvement unnecessary. This disconnect between the FCC’s apparent view of its authority to resolve petitions for reconsideration and the way the courts process agency appeals provides yet another indication that the FCC’s modification of the standards that apply to the protection of out-of-core Class A-eligible stations in the *Second Reconsideration Order* was procedurally improper.

**B. The FCC’s Action Was Not Authorized Under Provisions Permitting *Sua Sponte* Reconsideration or Declaratory Rulings.**

The FCC’s action with respect to out-of-core Class A-eligible stations in the *Second Reconsideration Order* was also not permissible even if it was considered either a *sua sponte* reconsideration or a declaratory ruling.<sup>44</sup> As an initial matter, the FCC’s rules provide an

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<sup>43</sup> *Id.*

<sup>44</sup> Notably, the FCC did not rely on its authority to reconsider orders on its own motion or to issue declaratory rulings anywhere in the *Second Reconsideration Order*



unambiguous 30-day timeframe within which the agency can reconsider a decision on its own motion.<sup>45</sup> The *Second Reconsideration Order* was issued *more than one year* after the *Incentive Auction R&O*, well after the time for *sua sponte* reconsideration had expired. Although, as noted above, parties (including some of the Petitioners) had filed petitions for reconsideration requesting that the Commission afford protection to additional out-of-core Class A-eligible stations, none asked the FCC to alter its decision on this issue in the manner that it ultimately did. Thus, to the extent the FCC wanted to change its decision, its own rules required it to do so within 30 days. Accepting the contrary view would enable the FCC to evade the 30-day limit on *sua sponte* reconsideration, effectively rendering that provision entirely irrelevant in any instance in which a petition for reconsideration is filed. It would also run afoul of the basic principle of statutory construction requiring that statutes and regulations be construed “so that no provision is rendered inoperative or superfluous, void or insignificant.”<sup>46</sup>

In addition, the FCC’s authority to issue declaratory rulings is limited by the Administrative Procedure Act and the agency’s own rules to circumstances in which the Commission acts to “terminate a controversy or remove uncertainty.”<sup>47</sup> The expansion of the class of Class A licenses entitled to mandatory protection cannot be fairly characterized as a “clarification” or removal of uncertainty but was, rather, a substantive alteration of the Report and Order. In past cases, the FCC has determined that a declaratory ruling was procedurally inappropriate because the requested action did not terminate a controversy or resolve uncertainty

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<sup>45</sup> 47 C.F.R. § 1.108.

<sup>46</sup> *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (quoting *Mail Order Ass’n v. United States Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993)).

<sup>47</sup> 5 U.S.C. § 554(e); *see* 47 C.F.R. § 1.2.

or because the Commission’s earlier ruling on an issue had been clear.<sup>48</sup> Here, just as in those cases, the FCC’s *Incentive Auction R&O* was unequivocal, stating that the agency would extend discretionary protection to one out-of-core Class A-eligible station, and one such station only.<sup>49</sup> Accordingly, the FCC’s action in the *Incentive Auction R&O* with respect to such stations exceeded its authority to issue declaratory rulings as well.

**C. The FCC Arbitrarily Discriminated Against Petitioners By Refusing To Consider Their Arguments While Granting Relief To Others.**

Finally, the FCC’s decision with respect to out-of-core Class A-eligible stations violated the Administrative Procedure Act’s separate mandate that administrative agencies afford similarly situated parties equivalent treatment.<sup>50</sup> As discussed above, in the *Second Reconsideration Order*, the FCC afforded protection to *all* Class A-eligible stations that had a Class A conversion application pending or granted as of February 22, 2012, even though none of those parties filed timely petitions for reconsideration requesting such relief and many never requested protection at all. On the other hand, the FCC faulted Videohouse and Abacus (as well as WMTM’s predecessor) for failing to raise the arguments presented in their filings earlier in

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<sup>48</sup> See, e.g., *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 2015 WL 4387780, at \*37 (2015) (refusing to issue declaratory ruling where the Commission “f[ou]nd no uncertainty on this issue, and view[ed] [the] request as seeking reversal of the Commission’s prior ruling . . . rather than seeking clarification, and therefore inappropriate for declaratory ruling”); *Competition in the Interstate Interexchange Marketplace—Petitions for Modification of Fresh Look Policy, Final Rule*, 58 FR 42251-01 (1993) (finding that a declaratory ruling was an “inappropriate vehicle” to alter a conclusion that it had previously “stated unequivocally”).

<sup>49</sup> *Incentive Auction R&O*, ¶ 233 (“With one exception, we will not protect stations that are eligible for a Class A license but that did not file an application for such license until after February 22, 2012, even if the application is granted before the auction.”); *id.* ¶ 235 (discussing particular station by name).

<sup>50</sup> E.g., *Independent Petroleum Ass’n of Am.*, 92 F.3d at 1260; *McElroy Elec. Corp.*, 990 F.2d at 1365; *Melody Music, Inc. v. FCC*, 345 F.2d at 732-33.

the proceeding.<sup>51</sup> The Commission offered no explanation for this disparate treatment—let alone one that “explain[s] the relevance of those differences to the purposes of the Federal Communications Act”<sup>52</sup>—and there is none.

#### **IV. THE INSTANT PETITION COMPLIES WITH SECTION 1.429 OF THE COMMISSION’S RULES.**

Because the *Second Reconsideration Order* “modif[ied]” the *Incentive Auction R&O* as to the discretionary protection of Class A-eligible stations, it is “subject to reconsideration in the same manner as the original order.”<sup>53</sup> To the extent that this Petition contains facts that were not previously presented to the Commission, Petitioners submit that it would be “in the public interest” to consider them because doing so would ensure the ability of a very small number of additional stations to continue serving their audiences with valued programming and would not significantly complicate the FCC’s post-auction repacking process.<sup>54</sup> In addition, the fact that the four stations that are the subject of this Petition are the only ones that would be protected if the Commission extended discretionary protection in the manner requested is based on “events which have occurred and circumstances which have changed” since the Petitioners’ last opportunity to present such matters to the FCC.<sup>55</sup> Indeed, the deadline for submission of the Form 2100, Schedule 381 was July 9, 2015, approximately twenty days *after* the *Second Order*

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<sup>51</sup> See, e.g., *Second Reconsideration Order*, ¶ 53 n.183 (treating Asiavision’s opposition to petitions for reconsideration as a late-filed petition and dismissing it); *id.* ¶ 54 (dismissing Abacus’ filing related to the number of stations that the FCC would have to protect as a late-filed petition and dismissing it); *id.* ¶ 59 (dismissing arguments of Abacus and Videohouse that the FCC unlawfully discriminated against their stations by failing to extend discretionary protection to them because these arguments were allegedly not presented earlier in the proceeding).

<sup>52</sup> *Melody Music*, 345 F.2d at 733.

<sup>53</sup> 47 C.F.R. § 1.429(i).

<sup>54</sup> *Id.* § 1.429(b)(3).

<sup>55</sup> *Id.* § 1.429(b)(1).

on *Reconsideration* was released. Finally, Petitioners could not have determined “through the exercise of ordinary diligence” that the Commission would “clarify” its *Incentive Auction R&O* while denying petitions for reconsideration.<sup>56</sup> As explained above, no party requested that relief and the FCC did not otherwise provide any notice that it might grant it.

## V. CONCLUSION

Petitioners agree with the FCC’s decision to extend discretionary protection to stations that hold a Class A license today and that had an application for a Class A conversion application pending or granted as of February 22, 2012. However, the Commission’s refusal to extend equivalent treatment to the stations licensed to Petitioners was based on inaccurate factual determinations and violated applicable procedural requirements. Grant of this petition is necessary to appropriately balance the equities in favor of protecting these four stations and, due to their small number and Class A status, will not limit the Commission’s flexibility in the repacking process.<sup>57</sup> Accordingly, Petitioners respectfully request that the FCC reconsider this aspect of the *Second Reconsideration Order* and extend protection to the four Class A-eligible stations that filed for a license to cover by the Pre-Auction Licensing deadline of May 29, 2015.

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<sup>56</sup> *Id.* § 1.429(b)(2).

<sup>57</sup> See *Second Order on Reconsideration* ¶ 62 & n.226.

Respectfully submitted,

THE VIDEOHOUSE, INC.

By: \_\_\_\_\_/s/\_\_\_\_\_  
Ronald J. Bruno, President  
975 Greentree Road  
Pittsburgh, PA 15220

WMTM, LLC

By: \_\_\_\_\_/s/\_\_\_\_\_  
Lawrence Rogow, Member  
5670 Wilshire Blvd, Ste. 1300  
Los Angeles, CA 90036

September 2, 2015

ABACUS TELEVISION

By: \_\_\_\_\_/s/\_\_\_\_\_  
Benjamin Perez, Owner  
514 Chautauqua Street  
Pittsburgh, PA 15214

KMYA, LLC

By: \_\_\_\_\_/s/\_\_\_\_\_  
Larry E. Morton, Co-President  
#1 Shackleford Drive  
Little Rock, AR 72211

**Exhibit 1**

Petitions for Eligible Entity Status

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

The Videohouse, Inc.,  
WOSC-CD, Pittsburgh, PA  
Facility ID No. 66636  
Channel 26  
BLDTL-20130327AEC

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GN Docket No. 12-268  
DA 15-679

**ACCEPTED/FILED**

**JUL -9 2015**

To: The Secretary  
Attn: Barbara A. Kreisman,  
Chief, Video Division, Media Bureau

Federal Communications Commission  
Office of the Secretary

**PETITION FOR ELIGIBLE ENTITY STATUS**

Pursuant to the Media Bureau's Public Notice, DA 15-679 (rel. June 9, 2015), The Videohouse, Inc. ("Videohouse"), licensee of Digital Class A Station WOSC-CD, Channel 26, Pittsburgh, Pennsylvania (Facility ID No. 66636) ("WOSC" or the "Station"), respectfully requests that the Commission designate WOSC eligible for protection in the repacking process and for relinquishment in the reverse auction (*i.e.*, an "eligible facility"). Videohouse believes the Station is eligible for discretionary protection consistent with the Report and Order, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, 29 FCC Rcd 6567 (2014).

WOSC is a Class A eligible station that applied for and received Class A status after February 22, 2012. We are aware that the Commission believes there are possibly 100 out-of-core Class A eligible stations that still had not filed for Class A status as of May 29, 2015. See Second Order on Reconsideration, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268 (rel. June 19, 2015), at ¶ 51 n.177



(the "Reconsideration Order"). WOSC is not one of these stations and does not support service protection or auction participation for stations that fall into that category. Meanwhile, the FCC has mandated that May 29, 2015 is the cutoff date for all stations to have their Class A and full power stations built in order to be eligible for protection and auction participation. WOSC satisfied this deadline and should be treated similarly to other eligible stations -- indeed, WOSC built its in-core digital facilities and filed for its Class A status over two and a half years ago. In fact, we will demonstrate that from the year 2000, Videohouse did everything in its power to build our station and file an accurate, truthful and timely application for a Class A license -- despite multiple hurdles and uniquely difficult circumstances beyond its control.

The Reconsideration Order denied WOSC's Petition for Reconsideration. However, the findings in the Reconsideration Order are inaccurate in several critical respects as it relates to WOSC.

First, the Reconsideration Order says that "petitioners [including Videohouse] did not certify continuing compliance with Class A requirements in an application filed with the Commission until after the enactment of the Spectrum Act, and they had no justification for not seeking discretionary protection in response to the Incentive Auction NPRM." Reconsideration Order at ¶ 62.

This is simply not true with respect to WOSC. The Station has continually certified its compliance with Class A requirements. Starting with the certification for the 2nd quarter of 2000 WOSC continually filed, on a quarterly basis, its certification of compliance with Class A requirements. WOSC placed certifications of its continuing compliance with the Class A requirements in the station's local Public Inspection File, where they were (and are) available for inspection by the public and the FCC. The Commission prevented the filing of these



certifications in its online Public Inspection File system by limiting access to that system to stations that had already been granted Class A status. So it was impossible for WOSC to file its Class A certifications online until the certification for the first quarter of 2014 -- at which time we uploaded retroactively all of the Station's certifications dating back to 2000.

Second, WOSC is and has been compliant with children's programming requirements since they became effective. WOSC diligently and regularly devotes many staff hours per week to ensure that all children's programming is airing properly and in compliance with the children's programming requirements. In fact, WOSC has a dedicated server to air children's programming to insure that all programs make the air and are compliant. WOSC's children's programming reports (beginning Q1 2006) are maintained in the FCC's online Public Inspection File and in the Station's local Public Inspection File.

Third, the Reconsideration Order states that "petitioners did not attempt to demonstrate in response to the Incentive Auction NPRM why they should be afforded discretionary protection. Rather, on reconsideration, petitioners for the first time attempt to explain why they also should be extended discretionary protection. They have not shown, however, why they were unable to raise these facts and arguments before adoption of the Incentive Auction R&O." Reconsideration Order at ¶ 59.

Once again, this statement is not true with respect to WOSC. In my capacity as the owner of Videohouse, the licensee of WOSC, and an investor in 11 other stations -- and as one of the founders of the Class A service -- I advised the Commission that "it would be unfair to Class A Television Licensees to use February 22, 2012 as the date for determining which spectrum usage rights an eligible Class A licensee will be bidding to relinquish in the reverse spectrum auction. In our own experience, we have built a substantial portion of our digital

stations since February 22, 2012.” *See* Reply Comments of Bruno Goodworth Network in GN Docket No. 12-268 (March 11, 2013).

At the request of the Media Bureau, I personally facilitated their outreach to other Class A licensees to support and participate in the Incentive Auction. Thus, on Monday April 8, 2013, I advised representatives of the Media Bureau and the Incentive Auction Task Force (“IATF”) at an NAB forum that “there were approximately 304 out-of-core Class A Qualified Television stations that originally filed for eligibility for Class A and were accepted. Most of them have just found or are finding a digital channel in the core spectrum. This is because full power stations had both digital and analog channels were crowding the spectrum to the point that these Class A qualified stations could not find a home in the core until now when the full powers relinquished their analog channels. These stations are in the process of building their facilities and should be accorded all rights to participate in the auction and be protected in the repack. Some have multiple construction and engineering problems like my station WOSC in Pittsburgh that did not finish building until after February 22, 2012.”

So it is clear that Videohouse publically and repeatedly asserted that WOSC was subject to discretionary protection. I also consistently took the position before both the Media Bureau and the IATF that using February 22, 2012 as the eligibility cutoff date was not appropriate or acceptable for Class A eligible stations. *See* Reply of Bruno Goodworth Network, Inc. in GN Docket No. 12-268 (Nov. 24, 2014).

As described above, WOSC had a clear history of compliance with Class A requirements and of trying to convert to Class A status -- but it encountered unforeseeable obstacles that prevented it from filing before February 22, 2012. Specifically, WOSC operated on Channel 61 analog. From the years 2000 to 2009 Videohouse could not find a new home for



WOSC in the in-core spectrum of channels 2-51 because it operated in a highly congested market and therefore needed to wait until the digital transition was over and then apply for an in-core channel that was to be given up by a full power analog station in the area.

Preliminarily we identified channel 26 as a potential candidate for an acceptable in-core channel. WQEX (owned by WQED Multimedia, Inc.) operated on analog channel 16 and digital channel 26 and transmitted from the same tower as WOSC. Its sister station WQED, meanwhile, operated on analog channel 13 and digital channel 38. The tower is a "candelabra" with two "candles." One of the "candles" housed WQED's channel 13 antenna; the other housed WQEX's channel 16 and 26 and WQED's channel 38 on one antenna. This was an elaborate combining system and it worked well for them.

WOSC analog was located at 330 feet on the WQED tower. WOSC's antenna was a dual antenna system array that housed many Class A and LPTV stations in the area.

Early in 2009 WQED announced that it would use channel 13 for WQED's permanent digital facilities and channel 38 for WQEX's permanent digital facilities. This meant that there would be two free channels on the combined antenna. Once we received this information we asked WQED to let us use the freed up channels in their transmission plant for our stations. We decided that WOSC could use Channel 26.

In early March 2009 we began talking to WQED about the possibility of using channel 26 and its transmission plant. As part of these discussions we asked WQED to give us an interference waiver so that we could apply for a construction permit and build out the Station simultaneously with the transition of WQEX to digital-only operations. Thereafter, and as described in more detail below, in March 2009 WOSC applied for, and in September 2009 was granted, a construction permit for in-core digital channel 26.

*However, we did not believe in good faith that we could file for Class A status on channel 26 until we were certain that channel 26 ultimately would be feasible to use if we did not have access to the existing WQEX tower site. We also were concerned that if for some reason after we filed for Class A status on channel 26, the channel turned out not to be feasible so that our filing had been premature and inaccurate, we would not be permitted to modify our Class A status to specify an alternative channel.*

The following timeline summarizes the key milestones in our quest to complete WOSC's transition to an in-core digital channel and perfect our Class A status:

- March 2009: WOSC applies for Channel 26 for its in-core digital facilities.
- June 2009: WQEX relinquishes Channel 26 digital and moves to Channel 38 digital.
- September 2009: WOSC is granted a construction permit to build its in-core facilities on Channel 26.
- November 2009: WOSC begins negotiations with WQED for the use of its transmission equipment for Channel 26.
- December 2009: Negotiations pause for the holidays.
- January 2010: Negotiations resume.
- February 2010: Negotiations appear to stall. (We did not know it at the time but WQEX was in the process of being sold.)
- On or about April 2010: WQED sells the Channel 26 digital transmitter to another entity. WOSC had been hopeful that it would be able to lease this transmitter from WQED for WOSC's digital Channel 26 operations.
- August 2010: WQED abruptly suspends negotiations regarding the use of the WQEX antenna and combining system pending the outcome of "another offer."
- September - October 2010: WQED does not engage with WOSC.
- November 8, 2010: WQED enters into a deal to sell WQEX to ION Media Networks, Inc.
- November 2010 - May 2011: WOSC is told to wait for the outcome of the WQEX sale to see "if" we could use the WQEX antenna and combining system.



- January 2011: Frustrated by WQED's reluctance to conclude the negotiations for the use of their tower and the remaining WQEX equipment, WOSC begins a search for another tower site.
- March 2011: WOSC locates a new site at the full power station WPGH site ("New Site No. 1") and begins negotiations with the tower owner.
- April 2011: WOSC identifies an alternative tower site at the full power station WPCB site ("New Site No. 2") and begins negotiations with the tower owner.
- May 2011: WOSC is informed that plans for it to use WQEX's equipment have been scrapped. The new owners have decided not to share the station's antenna and equipment.
- On or about July 2011: WOSC receives an FCC letter directing it to cease analog operations on December 31, 2011. WOSC continues to operate in analog on channel 61.
- July 2011: An engineering review of New Site No. 2 determines that WOSC's operation from that site would cause adjacent channel 25 interference. As a result plans to use that site are abandoned.
- August 2011: Following a lengthy negotiation, the owner of New Site No. 1 decides it does not want to lease space to other television stations, including WOSC. Negotiations are terminated.
- September 2011: Realizing that use of Channel 26 may not be feasible, WOSC works to identify an alternative digital in-core channel that could operate from New Site No. 2.
- October 2011: WOSC begins plans to shut down its Channel 61 analog facilities per the FCC's directive. Plans call for a complete change in the way the current analog antenna array will work with all the other stations located at 330 feet. The high band antenna will be removed, the combiner on the tower will be removed and existing channels will be combined into the low band antenna through a new combiner.
- November 2011: Equipment for this project is ordered. Delivery is scattered in November and December.
- December 31, 2011: WOSC ceases analog operations.
- January 2012: WOSC removes analog gear in transmitter building and installs digital transmitter and combiner.
- February 2012: It is too cold for tower climbers to remove the high band antenna. However, because WOSC needs to get back on the air it begins testing digital transmission through its existing antenna array.

- February 22, 2012: Ironically, on this date the WOSC antenna fails and appears to have burnt out. The tower can't be climbed because of weather conditions and there is nothing that can be done from the ground.
- April 2012: Tower climbers finally remove the high band antenna at 330 feet and direct connect the low band antenna. WOSC begins to test its digital facilities.
- May 2012: WOSC's digital signal is not steady and causes massive reflected power. The Station's transmitter intermittently shuts down automatically.
- June 2012: Tower climbers determine that the connector to the antenna is defective and replace it. The system seems to be working but within two days reflective power returns and shuts down the system. (We learn after many months that humidity and water caused these problems.)
- July 2012: On a beautiful sunny dry day, tower climbers sweep the system and can't find any problems. System tests over two weeks produce intermittent errors and automatic shutdowns. The problem could be water-related but the system does not react every time it rains. Engineers are puzzled.
- August 2012: Testing continues and it is determined that the jumper cable from the main line to the new antenna connector is defective. It is replaced, but intermittent problems persist. The decision is made to completely tear down the antenna system and start from scratch.
- September 2012: As a last ditch solution, a matching tuner is installed at the antenna and WOSC is able to test and hold a seemingly steady signal at a reduced power level. Engineers think the antenna is rated for low band channels 28 through 36 and therefore sending channel 26 into it may be the problem.
- October 2012: New antenna ordered.
- December 2012: New antenna delivered and WOSC files for STA to operate at reduced power.
- January 2013: New antenna installed. Signal is beautiful and steady.
- January 2013: WOSC returns to full power operation and files FCC form 302-CA for permanent Class A digital operations on Channel 26.

Thus, as should be clear from this chronology, WOSC worked diligently and in good faith to activate its permanent in-core digital facilities. But it was prevented by circumstances beyond its control -- circumstances that continued from March 2009 until January 2013 -- from filing Form 302-CA prior to February 22, 2012. We were clearly trying to find



another channel or tower to operate on so that we could do the right thing, which we believed to be to build our in-core digital facilities and file for Class A status.

It is also important to note that I was responsible for building and licensing five other Class A eligible stations in this region at the same time that I was working to complete construction of WOSC. Those stations were authorized in advance of February 22, 2012 because the build outs went smoothly and we didn't encounter the obstacles that faced WOSC.

The bottom line is that I did everything in my power, diligently and tirelessly, to build WOSC in a timely fashion. I have spent well over one hundred thousand dollars and too many man hours to count to build the station and comply with the rules and regulations that were on the books on February 22, 2012 and the rules and regulations that I have to follow today. The Pittsburgh area remains spectrum-constrained today, and I am concerned that, absent protection in the repacking process, WOSC will be compelled to cease operations and go out of business. This would result in the loss of our huge investment of economic and human resources in the Station, and would disserve the public interest in diversity and competition.

Accordingly, for all the reasons stated herein, pursuant to the Commission's discretionary authority, WOSC should be designated an eligible facility subject to protection in the repacking process and for relinquishment in the reverse auction.

Respectfully Submitted,

**THE VIDEOHOUSE, INC.**

By: 

Ronald J. Bruno, President

July 9, 2015

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Abacus Television	)	GN Docket No. 12-268
WPTG-CD, Pittsburgh, PA	)	
Facility ID No. 272	)	
Channel No. 49	)	
BLDTL-20130702ABO	)	

To: Marlene Dortch, Secretary  
Attn: Barbara A. Kreisman, Chief  
Video Division, Media Bureau Room 2-A666

**PETITION FOR ELIGIBLE ENTITY STATUS**

Pursuant to the Media Bureau’s Public Notice, DA 15-679 (rel. June 9, 2015), Abacus Television (“Abacus”), licensee of Class A Station WPTG-CD, Pittsburgh, PA, Facility ID No. 272 (“WPTG-CD” or the “Station”), respectfully requests that the Commission designate WPTG-CD eligible for protection in the repacking process and for relinquishment in the reverse auction (*e.g.*, “eligible facility”). Abacus believes the Station is eligible for discretionary protection consistent with the Report and Order, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, 29 FCC Rcd 6567 (2014).

WPTG-CD is a formerly out-of-core, Class A eligible station that applied for and received its Class A license after February 22, 2012. Notwithstanding a conclusion in the Second Order on Reconsideration Docket No. 12-268, Abacus believes it is identically situated to Class A station KHTV-CD insofar as it took steps to remove its secondary status in a timely



manner, and therefore should be extended discretionary protection in the upcoming spectrum repack.<sup>1</sup> This is the only equitable resolution of the question, because Abacus did everything in its power to document its continued compliance with the requirements for Class A license eligibility, to build its in-core digital Station in a timely manner, and to file an accurate, truthful and timely application for its Class A license.

A more detailed history of Abacus's efforts to move this Station in-core and construct its digital facility would be helpful in demonstrating its similarity to the pre-licensing efforts of KHTV-CD.

- On September 9, 1988 Abacus was selected in a lottery for UHF channel 69.
- On August 29, 2002 Abacus received its construction permit for channel 69, after a long difficult tower search, BPTTL-20010122ABB.
- On August 28, 1997 Abacus received its license on channel 69, BLTTL-19970522JC.
- On October 19, 2009 Abacus filed a displacement application for in-core channel 32, BDISDTL-20091019AAJ.
- On March 15, 2010 Abacus received a 30 day letter saying that its application for channel 32 caused interference to the recently filed maximization application for channel 33 by WBNP-TV, Morgantown, WV.
- On September 17, 2010 Abacus's move-in application was dismissed.
- Abacus hired a consulting engineer to adjust its channel 32 parameters to specify a directional pattern and reduced ERP to protect the WBNP-TV construction permit and re-filed its channel 32 move-in request, BDISDTL-201101830ADX.

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<sup>1</sup> By email on 3/26/2014 Abacus submitted a "History of WPTG-LD efforts to gain Class A status" to [Barbara.kreisman@fcc.gov](mailto:Barbara.kreisman@fcc.gov) in an effort to demonstrate how long and hard it had tried to get this Station into Class A status. This ex parte filing apparently did not make its way into the record of GN Docket No 12-268, because the Report and Order in that proceeding did not conclude that WPTG-CD was similarly situated to KHTV-CD.

- On September 27, 2011 Abacus received a thirty day letter regarding predicted interference to WNBK-TV, BLCDT-20051018ACE (33D).
- In November of 2011 Abacus commissioned a terrain study of each azimuth between its proposed channel 32 facility and WNBK-TV, which study did not satisfy the Commission's engineer that no interference would be caused to WNBK-TV.
- Abacus again engaged a consulting engineer to study the problems with its application for channel 32. On January 25, 2012 Abacus received a letter from that consulting engineer explaining that WNBK-TV would probably not build the upgrade, that the conflicting construction permit would expire on May 13, 2012, at which point the pending displacement application would become grantable.
- On March 15, 2012 Abacus wrote a letter to Mr. Acker at WNBK-TV requesting a no objection letter if Abacus specified a "sharp tuned" filter that would protect its adjacent channel 33. Despite repeated follow up calls Abacus got no response to its request for a no objection letter from WNBK-TV.
- On October 12, 2012 Abacus's channel 32 move-in application was again dismissed.
- In 2009 Larry Schercongost, licensee of WLLS-LP (49A) died. His spouse was appointed Executrix and on November 23, 2010 the license for WLLS-LP was transferred to her.
- For a one year period beginning in January 2011 Abacus negotiated with Mrs. Schercongost to purchase WLLS-LP so it could use channel 49. Despite extensive negotiations Abacus could not reach agreement on an acceptable price.
- On March 17, 2012 the Commission cancelled the license for WLLS-LP, because it had been off the air for more than one year.

- On April 27, 2012 Abacus filed an application to use channel 49 as a digital companion channel for its station WQVC-CA in nearby Greensburg, PA, BDCCDTL-20120427ABF.
- Despite an exhaustive channel search Abacus was unable to locate a usable channel on which to move WPTG-LP into core. In desperation Abacus decided to voluntarily dismiss the construction permit it had received on channel 49 for WQVC-CA and simultaneously file an application on channel 49 for WPTG-LP, BDISDTL-20120924AJD.
- December 8, 2012 Abacus received a grant of its displacement onto channel 49 for WPTG-LD, BDISDTL 20120924AJD.
- Upon receiving its in-core construction permit Abacus immediately constructed its digital facility and on January 16, 2013 Abacus filed an application to convert WPTG-LD to Class A, BLDTA-20130116AEB.
- On January 18, 2013 Abacus's Class A conversion application was dismissed Broadcast Action Report 27909.
- On January 18, 2013 re-filed its conversion application, BLDTA-2013018ABY.
- After waiting six months Abacus consulted with the Commission staff to find out why its pending Class A conversion application had not been granted. Abacus was advised to file an application to license its constructed station as a LP first, and only then ask for its license to be converted to Class A.
- On July 2, 2013 Abacus filed a license to cover digital 49 as an LP, as directed by the Commission staff, BLDTL-20130702ABO.

- On July 9, 2013 Abacus amended its pending conversion application from a request to convert its LP construction permit to a request to convert a LP license to Class A.
- On December 23, 2013 Abacus was granted a Low Power license modification for WPTG-LD on channel 49 digital.
- On April 25, 2014 the Commission granted its pending application BLDTA-20130118ABY converting WPTG-CD to Class A.

In summary, Abacus has worked on a continuous basis since mid 2011 to bring WPTG-LP in-core and convert it to Class A status, but was unable to do so until early 2013 because of the lack of a suitable channel on which to displace from analog channel 69. It was only of virtue of the cancellation in mid 2012 of an LP license in its television market that Abacus was finally able to move in-core. Accordingly, the Commission should use its discretion to allow WPTG-CD to participate in the reverse auction and protect its service area and viewer population during the spectrum re-pack.

Abacus wishes to emphasize at all times since the 3<sup>rd</sup> quarter of 2000 WPTG-LP was operated consistent with its status as a Class A eligible station. The Commission can be confident that this is the case, because of the way Abacus ran its station network. Abacus was the licensee of thirteen Class A and Class A eligible stations arranged in a contiguous network covering the Pittsburgh television market as well as the adjacent Johnstown-Altoona and Steubenville-Wheeling TV markets. The stations were spaced so that each of the stations could receive the off-air signal of one or more of the other stations and had an LPTV protected contour that overlapped the LPTV protected contour of one or more of the stations in the network. The station in the center of the market was WPTG-LP. Abacus transmitted its programming from its studio in North Versailles, PA (which was in the WPTG-LP Grade B contour), by an on channel

STL to WPTG-LP which rebroadcast the studio feed. Each of the other stations in the network then picked up the WPTG-LP signal and retransmitted it on their respective channels.

When the opportunity arose in mid-2000 to become Class A, Abacus filed for Class A eligibility for all of its stations and immediately filed for Class A status for all of its constructed, in-core facilities (e.g., WBYD-CD, WQVC-CD, WTOO-CD, WWAT-CD). It programmed its Pittsburgh area network to include at least 3 hours and often more hours of E/I certified children's programming. In addition Abacus produced an auction show that ran Friday, Saturday, and Sunday evenings from 6:00 until midnight, for a total of 18 hours of locally produced locally originated programming. All of this Class A qualifying programming was delivered to the outlying Class A stations by first being transmitted by WPTG-CD. The Class A stations filed their Form 398's quarterly, providing the Commission with documentation of their compliance. As a result, the Commission also has documentation of WPTG-CD's compliance with the children's programming requirements, since WPTG-CD by definition transmitted the same programming as the outlying Class A stations. In addition, Abacus has filed Form 398's for WPTG-CD covering the period from the First Quarter 2006 (one year prior to its previous license renewal date) to present.

WPTG-CD similarly automatically complied with its obligation to transmit locally originated locally produced programming and programming addressing issues of importance to its community of license, because Abacus originated programming meeting those requirements for its Class A stations and that programming always passed through WPTG-CD first, on the way to the Class A's. The Class A stations filed their Certification of Continued Eligibility, their Public Issues Programming statements, and their Commercial Limitations in Children's programming statement on line quarterly, providing the Commission with documentation of their

compliance. As a result, the Commission also has documentation of WPTG-CD's compliance with the Certification of Continued Eligibility, Public Issues Programming and Commercial Limitations in Children's programming requirements, since WPTG-CD by definition transmitted the same programming as the outlying Class A stations. In addition, since the 3<sup>rd</sup> quarter of 2000, WPTG-CD on a quarterly basis has prepared and placed in its Station Public File Certification of Continuing Eligibility. In April 2014 Abacus uploaded all of WPTG-CD's Certifications of Continuing Eligibility back to the 3<sup>rd</sup> quarter of 2000 into its FCC on line Public File where they can easily be reviewed by the Commission.

In summary, the Commission has in its possession extensive documentation of and multiple certifications of WPTG-CD's continuing compliance with the Full Power television rules and all Class A television eligibility requirements. Abacus moved into core at the very first possible moment, constructed its digital facility quickly and sought Class A status immediately. When changes in the Commissions processing methodology required it to seek a Low Power TV license first, it immediately did so and then received its Class A license. The happenstance that it did not file for a Class A license until January of 2013 does not negate the fact that Abacus spent an excess of \$100,000 constructing WPTG-CD in reliance of a construction permit that did not expire until September 2015. Lastly, given the lack of available channels in the Pittsburgh, PA DMA, not affording WPTG-CD the same rights and protections as other Class A licensees will be tantamount to revoking its license, denying its audience of the last 18 years the programming, EAS, and free over the air television provided by WPTG-CD.

Accordingly, for all the reasons stated herein, pursuant to the Commission's discretionary authority, WPTG-CD should be designated an eligible facility subject to protection in the re-packing process and for relinquishment in the reverse auction.

Respectfully Submitted,

**ABACUS TELEVISION**

By: /s/ Benjamin Perez  
Benjamin Perez, Owner

July 9, 2015

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
WMTM, LLC	)	GN Docket No. 12-268
WIAV-CD, Washington D.C.	)	DA 15-679
Facility ID No. 168063	)	
Channel 44	)	
BLDTL - 20121231ANU	)	

To: Secretary, FCC  
Attn: Barbara A. Kreisman,  
Chief, Video Division, Media Bureau

**PETITION FOR ELIGIBLE ENTITY STATUS**

WMTM, LLC (“WMTM”), licensee of WIAV-CD, Washington D.C. (“WIAV”), pursuant to the Public Notice dated June 9, 2015 announcing incentive auction eligible facilities,<sup>1</sup> requests inclusion of WIAV on the list of stations eligible for protection in the repacking process and for relinquishment in the reverse auction.

WIAV is a Class A station that filed for and received a Class A license after February 22, 2012. In the Spectrum Auction Report and Order, it was not granted mandatory protection.<sup>2</sup> Asiavision, Inc., the previous licensee of WIAV, participated in the reconsideration phase of the Incentive Auction Report and Order, arguing that WIAV was entitled to discretionary

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<sup>1</sup> See Media Bureau Announces Incentive Auction Eligible Facilities and July 9, 2015 Deadline for Filing Pre-Auction Technical Certification Form, Public Notice, DA 15-679 (June 9, 2015) (“Public Notice”).

<sup>2</sup> Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567 ¶ 224 (2014) (“Incentive Auction Report and Order”).



protection.<sup>3</sup> In its Reconsideration Order, the Commission erroneously denied WIAV and similarly situated stations discretionary protection while *sua sponte* reconsidering its decision in the Incentive Auction Report and Order to grant protection to an alternate group of Class A stations.<sup>4</sup> There is no meaningful distinction between the group of stations granted discretionary protection and those left unprotected during the repacking process. WIAV is deserving of discretionary protection pursuant to the criteria set forth in the Reconsideration Order.

In the Reconsideration Order, the Commission protected a group of Class A stations—otherwise similarly situated to WIAV—for discretionary protection based upon their filing of a Form 302-CA to “convert” an in-core low power construction permit to a Class A construction permit. The Form 302-CA contains various certifications that the station is being operated in compliance with Class A requirements. WIAV—following the guidance of Media Bureau staff—did not file a Form 302-CA to “convert” its in-core construction permit to a Class A construction permit. Rather, as directed, it built its in-core facility, licensed it as a low-power station and then converted its licensed facility to a Class A facility. Because it followed the guidance of Media Bureau staff, it did not have a Form 302-CA to convert its construction permit on file as of February 22, 2012. However, at all times after receiving its in-core construction permit, it operated as a Class A station.

WIAV should receive discretionary protection in the repacking process. It, like all the Class A stations granted discretionary protection, (i) timely filed a certificate of Class A eligibility; (ii) obtained and built an in-core channel by the deadline established by the Media

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<sup>3</sup> See Opposition of Asiavision, Inc., filed Nov. 9, 2014.

<sup>4</sup> See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, Second Order on Reconsideration, ¶¶ 50-62 (rel. June 19, 2015), (“Reconsideration Order”).

Bureau, (iii) licensed its in-core facility as directed by Media Bureau staff, and (iv) operated its in-core facility in compliance with Class A requirements.

For the foregoing reasons, WIAV respectfully requests that the Media Bureau accept its Form 2100-Schedule 381 and include WIAV in the list of protected stations.

Respectfully submitted,

WMTM, LLC

By:

A handwritten signature in blue ink, appearing to read "Joan Stewart", is written over a horizontal line.

Joan Stewart  
Its Attorney  
Wiley Rein LLP  
1776 K Street, NW  
Washington, DC 20006

Dated July 9, 2015

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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JUL -9 2015

In re Eligible Entity Status for )  
)  
KKYK-CD, Little Rock, Arkansas ) Facility ID 57548  
)

Federal Communications Commission  
Office of the Secretary

To: Office of the Secretary  
Attention: Barbara A. Kreisman, Chief, Video Division, Media Bureau, Room 2-A666

**PETITION FOR ELIGIBLE ENTITY STATUS**

1. KMYA, LLC (the "Licensee"), by its attorney and pursuant to the Public Notice released June 9, 2015 (DA 15-679) (the "*Eligible Facilities PN*") announcing television broadcast facilities eligible for repacking protection and/or participation in the Incentive Auction, hereby petitions for eligible entity status for Digital Class A Television Station KKYK-CD, Little Rock, Arkansas (Facility Id. 57548) (the "Digital Facilities"). KKYK-CD is entitled to discretionary protection based on precedent and equitable considerations. The Licensee specifically disputes the Commission's apparent decision to withhold eligible facilities status to KKYK-CD because it was an out-of-core Class A-eligible low power television station which had not filed a license application prior to February 22, 2012 (the "Cut-Off Date"). As demonstrated herein, precedent and the equities demand extension of discretionary protection to the Digital Facilities. In the alternative, and at a minimum, Licensee petitions for eligible entity status for the previous KKYK-CA analog facilities (the "Analog Facilities"), which are entitled to mandatory repacking protection and eligibility for relinquishment in the Incentive Auction.

2. **Background.** KKYK-LP<sup>1</sup> was a qualified Class A-eligible analog television station operating out-of-core on Channel 58 in 2009 when its then-owner, Equity Media Holdings Corporation, entered Chapter 11 bankruptcy. The station was sold out of bankruptcy that same year to Pinnacle Media, LLC (File No. BALTTL-20090814AAK). Within six months of this acquisition, Pinnacle filed an application seeking a construction permit for a digital low power displacement to an in-core channel, Channel 16 (BDISDTL-20100524AHW). After nearly six months of no action by the Commission, the Video Division staff instructed Pinnacle (by phone) to amend its application to protect a second-in-time low power station. Despite disagreeing with the Video Division's interference determination, Pinnacle complied for the sake of expediency, submitting an amended application on January 28, 2011. After yet *another* five months of Commission processing, the displacement authorization was finally granted on May 23, 2011 (the "Digital CP").

3. During the year-long processing delay, Pinnacle received notice on June 6, 2011 that the tower which had been specified in the displacement permit ("Tower A", for ease of reference) was unavailable because of lack of space. Pinnacle immediately began to review options for use of its existing (analog) tower for the new digital channel, only to be given notice that this tower was also fully loaded. Pinnacle, unable to find an alternate tower, began working with the owner and tenants of Tower A to share an antenna so that the KKYK digital station could operate on Tower A without occupying additional space. Pinnacle eventually resolved to acquire a custom-manufactured digital antenna that could be shared with another tenant, even

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<sup>1</sup> The station's call sign changed from KLRA-CD in 2013. Because KLRA-CD and KKYK-CD exchanged call signs, it is easy to confuse the two stations. This Petition relates only to Facility ID 57548, which will be referred to as "KKYK".



though it required a substantial power reduction (from 15kW to 0.8 kW). A minor modification of the Digital CP was filed on February 6, 2012 (BMPDTL-20120206AAJ), and was granted on February 16, 2012 -- *six days before* the Cut-Off Date. Pinnacle acquired and installed the custom antenna, then filed the license to cover on July 12, 2012 (BLDTA-20120712ABV), which license was quickly granted on July 18, 2012.

4. That same day, Pinnacle filed with the Commission an application to swap Class A television station licenses with KMYA, LLC, in a tax-free exchange (BALTTL-20120718ABE). This was necessitated by the extreme loss in power that resulted from the modifications to enable use of Tower A. The assignment application was not granted until December 12, 2012.

5. During the pendency of the assignment application, the need to file a separate application to convert the new digital facilities from out-of-core Class A-eligible to in-core Class A-licensed on Channel 16 was inadvertently overlooked. The appropriate license application was filed on October 10, 2012, and granted on October 23, 2012 (BLDTA-20121012ACZ). Thus, the Digital Facilities began operation on July 12, 2012, and the television station was fully authorized as a digital Class A as of October 23, 2012.

6. **Discussion.** In the *Incentive Auction Report & Order*, 29 FCC Rcd 6567 (2014), the Commission determined that certain full power and Class A television facilities were subject to mandatory protection for purposes of auction eligibility and post-auction repacking. *Id.* at paras. 184-89. The stations to be afforded mandatory protection, the Commission concluded, would be only those facilities which were in operation as of February 22, 2012. *Id.* at para. 186. In order to be operating, the Commission noted, such station facilities had either a granted license

or had on file an application for a license to cover the authorized construction permit specifying the facilities. *Id.*

7. The Commission further determined that, where appropriate, it would exercise its discretion to extend protection to certain other facilities. Among those facilities to be protected are “Class A facilities authorized by construction permits to implement Class A stations’ mandated transition to digital operations.” *Id.* at para. 194. Specifically, the Commission concluded that equities favored extending protection to Class A stations which did not have digital facilities authorized by the February 22, 2012 deadline, provided that extension of such discretionary protection would be limited to those facilities that were licensed by the Pre-Auction Licensing Deadline (May 29, 2015). *Id.* at para. 216. Finally, the Commission concluded that it would further serve the public interest to extend discretionary protection to Class A station facilities authorized on or before April 5, 2013.<sup>2</sup>

8. KKYK was not included in Appendix A of the *Eligible Facilities PN*, which specified which facilities will be accorded protection in the Incentive Auction for repacking and relinquishment purposes. This exclusion is clear error on the part of the Commission and must be corrected. As demonstrated above, the KKYK Class A Digital Facilities were authorized in a construction permit on February 16, 2012, which was prior to the Cut-Off Date for Class A digital transition construction permits to be protected in the auction. The Class A Digital Facilities were licensed by October 23, 2012, which satisfies the requirement that Class A digital construction permits eligible for protection be licensed by the Pre-Auction Filing Deadline. As both authorization dates fall squarely in the timeframes for which the Commission

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<sup>2</sup> April 5, 2013 is the date the Media Bureau issued its Public Notice announcing the backward-looking February 22, 2012 cut-off. *See* 28 FCC Record 4364 (2013) (the “Freeze PN”).



has concluded it should afford discretionary protection, the Commission must grant Eligible Entity Status to the Digital Facilities.<sup>3</sup>

9. KKYK is a Class A television station and has been operated as such by Licensee and its predecessor. As reflected in its online public file, KKYK has since 2009 met all the requirements of Class A operation despite being allocated to an out-of-core channel. Licensee cannot speak to the actions or omissions of the pre-2009 licensee, Equity Media Holdings Corporation (as itself and as debtor-in-possession) with regard to efforts to obtain an in-core channel. Licensee does rely, however, on the fact that the Commission determined the Class A eligibility remained in effect throughout the decade during which the out-of-core operation occurred. Moreover, Licensee and the previous licensee, Pinnacle Media, can and do confirm that at all times since the 2009 acquisition KKYK has provided Class A television service to the public of Little Rock. From 2009 to 2012, the station served the growing Spanish-speaking community in the Little Rock-Pine Bluff metropolitan region as the Univision affiliate and producer of local news and programming specifically of interest to the Hispanic audience of central Arkansas. Even during the time period in which Pinnacle endeavored to build the Digital Facilities, Pinnacle arranged for the station to be rebroadcast on a digital subchannel of another Class A station in the market to ensure the digital transition did not strand the local audience without Spanish programming. The programming was in such demand, in fact, that the majority of local cable providers carried the station despite the lack of any must-carry obligation to do so.

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<sup>3</sup> In anticipation of such protection, Licensee filed an FCC Form 2100, Schedule 381 Pre-Auction Technical Certification Form on July 7, 2015. *See* File No. 0000002976.



10. Upon the drastic reduction in power and subsequent station swap, KKYK became a Me-TV affiliate, broadcasting on its digital primary channel 16.1 the Nielsen-rated popular network offering family-friendly programming. KKYK also broadcasts, on its digital subchannels, Soul of the South (on 16.2), an African American-owned and -programmed network focused on serving the needs and interests of the black community in the South, as well as Cozi TV (on 16.3), which offers a mix of family-friendly classic television series, movies, and first-run lifestyle programming. In addition, KKYK continues to provide locally-produced news and programming to its community. It would therefore be an affront to the public interest not to ensure the Digital Facilities are protected in the Incentive Auction.

11. Licensee presumes, pursuant to the language of the *Incentive Auction Report & Order* at Section III.B.3.d.ii, that the Commission treated the Digital Facilities as ineligible because the station was, at the time of the Cut-Off Date, only a Class A-eligible station, because it was operating on an out-of-core channel. Licensee believes it is inequitable to impose such a severe hardship on a broadcast station whose owners endeavored to obtain an in-core digital channel to convert to Class A. KKYK's situation is not meaningfully different from that of KHTV-CD, which was granted relief in the *Incentive Auction R&O*. See *id.*, at para. 235. KKYK's attempt to obtain an in-core channel was stymied not by faults of its own but by the Commission's own inexplicably long application processing time. It is patently unfair and unreasonable for the Commission to treat KKYK-CD differently from KHTV-CD given that the only apparent distinction between the stations was that KHTV-CD had filed an Class A license application that allowed the station to go on record prior to the Cut-Off Date with certifications that it was meeting all of the Class A requirements. The Commission itself notes that this application was submitted to cover a construction permit that was *dismissed*, thus the license application on

which the Commission relies for this certification was erroneously allowed to remain pending until 2012 when the replacement applications were filed for KHTV-CD. *See id.* at para. 235 and n. 728. The Commission fails to explain why the certification included in an invalid application should carry more weight than the certification of ongoing Class A eligibility required to be made by any other Class A station. In KKYK's online public file are certificates of Class A eligibility covering 2009 to the present. The fact that the FCC found KKYK Class A-eligible upon issuing the digital in-core Class A permit in February 2012 indicates that it also found sufficient evidence that the station maintained its Class A eligibility throughout the time it took to obtain an in-core station. Because the Commission fails to provide a reasonable explanation for the apparent disparate treatment, it must treat KKYK equally with KHTV-CD and extend discretionary protection to the Digital Facilities.

12. What makes this particular set of circumstances even more compelling is the fact that, but for Pinnacle's acquisition of the station from the bankrupt prior licensee, the station likely would not have survived. Pinnacle and Licensee have provided community-focused Spanish-language programming<sup>4</sup> to an under-represented minority population. The public interest is

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<sup>4</sup> Among the local programs produced by and/or aired on KKYK are:

- *Asi Es! Arkansas*, an award-winning 30 minute weekly community news show that has been the air for almost 5 years. It covers stories on immigration, health, education, entertainment, local events, and community affairs.
- *Razorbacks En Espanol*, a 30-minute weekly Spanish-language sports show covering local sports and events, Razorback spots from the University of Arkansas, national and international sporting events, and other local sports stories of interest. It has been on the air over 10 years!
- *Que Pasa*, a weekly educational bilingual show which teaches kids and adults about Spanish and English and the cultural similarities and differences. Papa Rap (Al Lopez), who hosts the show, is a well-known personality and Latino leader in Arkansas who works in the Springdale School System to help bridge the gap with Latino families.



surely on the side of rewarding local broadcasters who provide such public services. Instead, what the Commission has done is akin to punishing the current licensee (and Pinnacle) for the prior failure of a licensee who succumbed to the financial collapse of 2007-2008. Most egregiously, the Commission deigns to hold KKYK to a crucial deadline of which neither Licensee nor Pinnacle had had prior notice – a critical deadline that also appears to be arbitrarily waived for some stations (KHTV-CD) and not others.

13. It is clear that the Commission must extend its discretionary protection to protect the KKYK Digital Facilities with regard to the Incentive Auction and the repack. However, assuming, *arguendo*, that the Commission fails to afford such discretionary protection, the Commission nevertheless is mandated, at minimum, to include the KKYK Analog Facilities, which were operated in compliance with the Class A rules, in the list of facilities eligible for protection in the repacking and for relinquishment in the reverse auction. As the Commission noted in the *Incentive Auction Report & Order*, 47 U.S.C. § 336(f)(6)(A) instructed that an out-of-core Class A-eligible LPTV station must be afforded primary status protection as a Class A facility immediately upon issuance of the in-core channel construction permit, and thereafter must be accorded a Class A license simultaneously upon the filing of a license to cover that in-core channel permit. *See id.* at para. 232 and n. 717. If the Commission insists on defying the statutory mandate to afford Class A protection to the permitted in-core facilities, then at the bare minimum the FCC must extend protection to the original analog Class-A eligible out-of-core LPTV facilities.

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- *Noticiero Arkansas*, the only local Spanish newscast in Arkansas, airing every Wednesday at 5 and 10 pm covering local news, weather, sports, national and international news.

14. **Conclusion.** As set forth herein, the Commission must extend discretionary Incentive Auction protection to the Digital Facilities of KKYK. In the alternative, and only as a Hail-Mary to restore some of the rights the Licensee is entitled to as a Class A licensee, the KKYK Analog Facilities must be included in the eligible station list for protection in the Incentive Auction.

July 9, 2015

Respectfully submitted,



Davina S. Sashkin  
Peter Tannenwald  
*Counsel for KMYA, LLC*

FLETCHER, HEALD & HILDRETH,  
PLC  
1300 N. 17<sup>th</sup> Street  
11<sup>th</sup> Floor  
Arlington, VA 22209  
703-812-0400  
[tannenwald@fhhlaw.com](mailto:tannenwald@fhhlaw.com)  
[sashkin@fhhlaw.com](mailto:sashkin@fhhlaw.com)

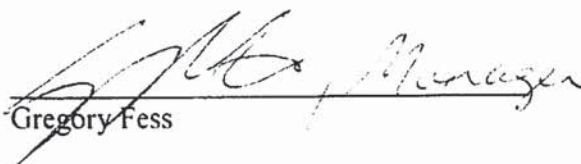
cc: Barbara Kreisman, Chief, Video Division, by email at [Barbara.Kreisman@fcc.gov](mailto:Barbara.Kreisman@fcc.gov)  
Evan Morris, Video Division, by email at [Evan.Morris@fcc.gov](mailto:Evan.Morris@fcc.gov)

## DECLARATION OF GREGORY FESS

I, Gregory Fess, do hereby declare under penalty of perjury, that:

1. I am Co-President of KMYA, LLC, the FCC licensee of KKYK-CD, Little Rock, Arkansas, Facility ID 57548 (the "Station").
2. I am also the majority member of Pinnacle Media, LLC, the prior licensee of the Station (then KLRA-LP/LD/DC). Throughout the time that Pinnacle Media was licensee of the Station, I was fully engaged in the operation of the Station, ensured maintenance of Class A eligibility, and personally oversaw the efforts to obtain an in-core channel and convert the Class-A eligible low power station to an in-core digital Class A.
3. The facts and representations stated in the enclosed Petition for Eligible Entity Status submitted on behalf of KMYA, LLC are true and accurate to the best of my knowledge and belief.

Executed on this 9<sup>th</sup> day of July, 2015.

  
Gregory Fess